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IN THE
COURT OF APPEALS OF INDIANA

TAVARIO BASKIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0609-CR-437
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Gene R. Duffin, Judge
Cause No. 20C01-9604-CF-16

March 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Tavario Baskin appeals the sixty-year sentence imposed following his conviction for murder, a felony. Baskin presents the following restated issue for review: Did the trial court properly sentence him?

We affirm.

In the early morning hours of March 2, 1996, Baskin was riding in a car with Games Birkhead and Abjul Johnson. Matthew Middleton flagged down their vehicle, displayed money, and asked to purchase drugs. The trio did not have drugs to sell. Baskin, however, exited the vehicle with a handgun and demanded Middleton's money. A brief struggle ensued between Middleton and Baskin over the handgun, which ultimately discharged and struck Middleton in the abdomen. Baskin and his companions fled the scene. Middleton died at the hospital several hours later as a result of the gunshot wound.

On April 9, 1996, the State charged Baskin, as well as Birkhead and Johnson, with murder. Baskin pleaded guilty on September 26, pursuant to a plea agreement in which the State agreed to dismiss a pending charge of robbery, a class A felony, under another cause number. Sentencing was left to the discretion of the trial court. On October 24, 1996, the trial court sentenced Baskin to sixty years in prison. The sentencing order sets forth the following mitigating and aggravating factors:

> The Court finds as mitigating circumstances the Defendant's age[1] and lack of a prior felony conviction. The Court finds as aggravating circumstances the fact that the Defendant was on probation as [sic] the time of the offense; the fact that the Defendant dropped out of school in the tenth grade; the fact

[1] Baskin was almost eighteen when he murdered Middleton.

> that the Defendant used alcohol and drugs; the fact that the Defendant was involved in an armed robbery with injury to victims three (3) days after the murder; and the fact that an illegal handgun was used in the commission of the crime. The Court finds that the aggravating circumstances outweigh the mitigating circumstances.

Appendix at 18-19.

In 2000, Baskin filed a pro se petition for post-conviction relief, and the State Public Defender was appointed to represent him. Thereafter, on January 13, 2005, Baskin filed a motion to dismiss his petition for post-conviction relief without prejudice and petition for the appointment of counsel to pursue proceedings under Indiana Post-Conviction Rule 2(1), which the trial court granted the same day. Baskin filed a petition for permission to file a belated notice of appeal on May 23, 2006, along with the notice of appeal. The petition was granted and the trial court accepted Baskin's belated notice of appeal. This appeal ensued. Additional information will be provided below as necessary.

Baskin first contends his enhanced sentence violates the rule set forth in *Blakely v. Washington*, 542 U.S. 296 (2004), because it is based in large part upon improper aggravating circumstances.[2] He argues *Blakely* applies retroactively to this belated appeal because his case was not yet final when *Blakely* was decided. Therefore, Baskin challenges two of the aggravating circumstances found by the trial court. Specifically, Baskin claims the trial court improperly found that he was involved in an armed robbery

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[2] "An aggravating circumstance is proper under *Blakely* when it is: 1) a fact of prior conviction; 2) found by a jury beyond a reasonable doubt; 3) admitted or stipulated by a defendant; or 4) found by a judge after the defendant consents to judicial fact-finding." *Wright v. State*, 836 N.E.2d 283, 292 (Ind. Ct. App. 2005), *trans. denied*.

three days after the murder and that an illegal handgun was used in the commission of the murder, as these facts were neither found by a jury nor admitted by him.

Our Supreme Court has stated that the *Blakely* rule applies retroactively to cases pending on direct review or not yet final at the time that *Blakely* was announced. *See Smylie v. State*, 823 N.E.2d 679 (Ind. 2005), *cert. denied*. Thus, in order to determine whether *Blakely* applies retroactively to the case at hand, we must ascertain whether this case was pending on direct review or not yet final at the time *Blakely* was handed down.

Baskin was sentenced in October 1996. *Blakely* was handed down on June 24, 2004, and Baskin filed his belated notice of appeal in May 2006. Therefore, as Baskin seems to acknowledge, his direct appeal was not pending at the time *Blakely* was decided. Baskin, however, argues that his case was not yet final when *Blakely* was announced.

"A conviction becomes final for purposes of retroactivity analysis when the availability of direct appeal has been exhausted." *Robbins v. State*, 839 N.E.2d 1196, 1199 (Ind. Ct. App. 2005). In addition, a timely notice of appeal must be filed within thirty days after the entry of a final judgment. Ind. Appellate Rule 9(A)(1). Baskin was sentenced in October 1996, making his notice of appeal due to be filed in November 1996. This did not occur. Therefore, Baskin's conviction became final for purposes of retroactivity in 1996, nearly eight years prior to the issuance of *Blakely*. *See Robbins v. State*, 839 N.E.2d 1196. Accordingly, Baskin is not entitled to raise a *Blakely* challenge because *Blakely* does not apply retroactively to this case. This is true even though, at the time *Blakely* was announced, Baskin still had the option of pursuing a belated appeal. *See id.* (holding that an appeal is "final" for *Blakely* purposes when the right to pursue a

timely appeal has lapsed, and that "timely" in this context does not include the prospect of filing a belated appeal under PC-2 rules); *see also Hull v. State*, 839 N.E.2d 1250 (Ind. Ct. App. 2005) (relying upon *Robbins*).[3]

Having determined that the *Blakely* rule does not apply in this case, we now turn to Baskin's remaining claim of sentencing error. In this regard, Baskin argues the trial court failed to identify two significant mitigating circumstances, his guilty plea and his remorsefulness.[4]

The finding of mitigating factors is not mandatory and rests within the sound discretion of the trial court. *O'Neill v. State*, 719 N.E.2d 1243 (Ind. 1999). Only when the trial court fails to find a significant mitigator that is clearly supported by the record is there a reasonable indication that it was overlooked. *Id*.

In the instant case, the trial court clearly addressed Baskin's expressions of remorse at the sentencing hearing. The court, however, explicitly rejected this proffered mitigator, explaining:

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[3] We acknowledge there is a split on this court regarding the retroactive application of *Blakely* in belated appeals such as this. For example, in *Gutermuth v. State*, 848 N.E.2d 716 (Ind. Ct. App. 2006), the majority expressly rejected *Robbins* and concluded that Gutermuth's case was not yet final when *Blakely* was decided because he still had the option of filing a belated appeal under PC-2. *See also Boyle v. State*, 851 N.E.2d 996 (Ind. Ct. App. 2006). Our Supreme Court has granted transfer in *Gutermuth* and has scheduled a joint oral argument, along with *Boyle* and two other cases, for March 22, 2007 on the issue of whether a belated appeal or other proceedings referred to in PC-2 is a direct appeal for purposes of *Blakely* and, if so, what evidence of timeliness and diligence is required. While it is clear our Supreme Court has yet to directly address this issue, we note that in a recent unanimous opinion involving a belated appeal, which was actually filed and pending when *Blakely* was announced, the Court summarily stated: "The sentence was imposed in 1994, long before [*Blakely* and *Smylie*] and is not subject to those cases." *Mathews v. State*, 849 N.E.2d 578, 589 (Ind. 2006).

[4] Aside from his *Blakely* claim, Baskin does not challenge the aggravating circumstances found by the trial court.

> Well, it wasn't a mistake that you had a gun. It was not a mistake that you attempted to rob him. It was not a mistake 3 days later when you committed another robbery. I don't think Mr. Middleton's family receives much solace from the fact that you said it was a mistake.
>
> One would tend to agree with [the State] that your actions did not show a great deal of remorse after the shooting. If your actions would show remorse, you wouldn't have been involved in the robbery 3 days later of a different person, and a different person being pistol whipped. And I think there were two victims in that robbery, and a bunch of other guns stolen. That's not the actions of a remorseful person.
>
> And I would think from looking at the entire record that you're remorseful and sorry that you're sitting here today. If you were remorseful for the murder, you would not have been involved in the robbery and the pistol beating of some other people just 3 days after this. Those are not reactions of a remorseful person.

Transcript at 23-24. Under the circumstances, we cannot say the trial court abused its discretion in discounting Baskin's expressions of remorse. *See Gibson v. State*, 856 N.E.2d 142, 148 (Ind. Ct. App. 2006) ("[r]emorse, or lack thereof, by a defendant often is something that is better gauged by a trial judge who views and hears a defendant's apology and demeanor first hand and determines the defendant's credibility").

Turning to Baskin's guilty plea, it is true that the trial court improperly failed to mention the guilty plea as a mitigating circumstance. *See Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005) ("[o]ur courts have long held that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return"). While a trial court should make some acknowledgment of a guilty plea when sentencing a defendant, the extent to which a guilty plea is mitigating will vary from case to case. *See Hope v. State*, 834 N.E.2d 713 (Ind. Ct. App. 2005). As has been frequently observed, "a plea is not necessarily a significant mitigating factor." *Cotto v. State*, 829 N.E.2d at 525.

Here, it is unlikely that the trial court would have imposed a lesser sentence if it had properly acknowledged the guilty-plea mitigator. Pursuant to Baskin's plea agreement, the State dismissed an unrelated charge of robbery, as a class A felony. Because Baskin received a substantial benefit in exchange for his guilty plea, he was entitled to only minimal mitigating weight for it at sentencing. Thus, we find that the trial court's omission in this regard was harmless error. *See Banks v. State*, 841 N.E.2d 654 (Ind. Ct. App. 2006), *trans. denied*; *see also Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one"), *trans. denied*.

Judgment affirmed.

KIRSCH, J., concurs.

RILEY, J., dissents with separate opinion.

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RILEY, Judge, dissenting

I respectfully dissent. I find that the *Blakely* rule does apply in this case. Indiana Post-Conviction Rule 2(1) provides, in pertinent part, that where a court grants a defendant permission to file a belated notice of appeal that "notice of appeal shall be treated for all purposes as if filed within the prescribed period." *Blakely* applies retroactively because Baskins appeal was not yet final when *Blakely* was decided. *See Meadows v. State*, 853 N.E.2d 996, 1032, 1035 (Ind.Ct.App. 2006) and *Baysinger v. State*, 854 N.E.2d 1211, 1214 (Ind.Ct.App. 2006).